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In The

Supreme Court of the United States

October Term, 1957

No. 1001

JOHN S. CARLI, *Petitioner,*

v.

STATE OF WISCONSIN, *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX AND SYNOPSIS OF ARGUMENT

PAGE

I. STATEMENT OF THE CASE 1-3

II. ARGUMENT 3-5

A. PETITIONER WAS NOT DENIED DUE PROCESS OF LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT BY REASON OF THE TRIAL COURT'S DICTATION OF HIS OPINION AND FINDING OF GUILT IN DEFENDANT'S ABSENCE 3-4

B. PETITIONER WAS NOT DENIED DUE PROCESS OF LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT BY REASON OF THE TRIAL COURT'S CONSIDERATION OF THE PRESENTENCE INVESTIGATION REPORT BEFORE PRONOUNCEMENT OF SENTENCE 4-5

III. CONCLUSION 6

CASES CITED

Birmingham v. State, (1938) 228 Wis. 448, 279 N. W. 15, 116 A. L. R. 554 5

Fowler v. Grimes, (1944) 198 Ga. 84, 31 S. E. 2d 174, *cert.* denied 323 U. S. 784 4

Martin v. Ihmsen, (1858) 62 U. S. 394 5

McCaskill Co. v. United States, (1910) 216 U. S. 504 5

Snyder v. Massachusetts, (1934) 291 U. S. 97 ..... 3, 4

Williams v. New York, (1949) 337 U. S. 241 4

TEXT

PAGE

3 Am. Jur. 593—App. and E. § 1037 5

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I. STATEMENT OF THE CASE

Petitioner was tried before the circuit court for Iron county, Wisconsin, Hon. Carl H. Daley of Superior, Wisconsin, circuit judge presiding, without a jury, on March 14 and 15, 1956. The court took the case under advisement and on May 15, 1956 dictated a memorandum opinion in which he reviewed the evidence and concluded "that the defendant, John Carli, is guilty of assault with intent to do great bodily harm" (Appendix B, pp. 14, 17). This memorandum opinion was dated and filed on June 26, 1956,

on which date the judge in open court and in the presence of defendant and his counsel pronounced judgment sentencing petitioner to imprisonment for one year (Appendix B, pp. 23-24).

In the meantime the trial judge had requested a probation officer of the state welfare department to make a presentence investigation. Ordinarily this would not be done until after the defendant was formally pronounced guilty, but in this case the judge determined to delay a formal adjudication of guilt, which he had already determined upon when he dictated his memorandum of May 15, until after the receipt of the presentence investigation report. The reason was that the petitioner resided at that time in the city of Milwaukee and the judge resided at Superior, and Judge Daley decided to spare the defendant one trip from Milwaukee to Hurley, Wisconsin, which is the county seat of Iron county (Appendix B, p. 17). This court will take judicial notice that Milwaukee is 311 miles from Hurley and Superior is 104 miles from Hurley (mileages indicated on official 1958 Wisconsin highway map prepared and distributed by the state highway commission).

There is no question, nor has it ever been denied, that the presentence investigation in no way affected the court's finding of guilt, which was in fact made before the presentence investigation was ordered, but was not formally entered and published until after the report was received. The court wished to find out from the presentence investigation "if there were any facts not within the knowledge of the Court which would cause the Court to change its mind on the question of a prison sentence, and to see if the State Department of Public Welfare would recommend probation" (Appendix B, p. 17).

The conviction was affirmed by the Wisconsin Supreme Court on appeal on November 8, 1957 (Appendix B, p. 19) and rehearing was denied on February 4, 1958 (Appendix B, p. 31). Petitioner seeks a writ of *certiorari* to review the judgment of the Wisconsin Supreme Court.

II. ARGUMENT

A. Petitioner was not Denied Due Process of Law in Violation of the Fourteenth Amendment by Reason of the Trial Court's Dictation of his Opinion and Finding of Guilt in Defendant's Absence.

The definitive case on the subject of when due process requires the presence of the defendant at a state criminal trial is *Snyder v. Massachusetts*, (1934) 291 U. S. 97, 107-108, where after a review of earlier cases and authorities this Court said:

> "* * * So far as the Fourteenth Amendment is concerned, the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only."

In this case the trial court had taken the matter under advisement after a full trial consuming two days. At that stage the situation was analogous to the point in a jury trial when the jury retires to deliberate. Surely no one would contend that the defendant has a right to be present during the deliberations of the jury and the signing of the verdict. On the contrary he is not even entitled as a matter of due process to be present in the *courtroom* during the time the jury is secluded and at the time it arrives at its

verdict, so long as he is present in court when the verdict is received and published. *Fowler v. Grimes*, (1944) 198 Ga. 84, 31 S. E. 2d 174, *cert.* denied 323 U. S. 784.

There was nothing that the defendant could have done to prevent the trial judge from dictating the opinion and finding him guilty if he had been present, any more than he could have prevented a jury from arriving at a verdict in the seclusion of the jury room if this had been a jury trial. Under the rule of *Snyder v. Massachusetts*, (1934) 291 U. S. 97, quoted above, it is apparent that due process was not violated by the absence of defendant during the dictation of the trial court's memorandum opinion including the finding of guilt.

B. Petitioner was not Denied Due Process of Law in Violation of the Fourteenth Amendment by Reason of the Trial Court's Consideration of the Presentence Investigation Report Before Pronouncement of Sentence.

This Court has approved the use by trial courts of presentence investigations made by probation officers as against the contention that they violate the due process clause of the Fourteenth Amendment. *Williams v. New York*, (1949) 337 U. S. 241.

While technically the petitioner should have been formally adjudged guilty before the presentence report was received by the trial judge, it does not appear that this is a requisite of due process so long as it is made clear that the presentence report was not taken into account in determining the question of guilt or innocence. That is abundantly plain in this case, since the finding of guilt

was dictated and transcribed before the report was requested, even though it was not filed and published in open court until after the presentence report was received.

The Wisconsin Supreme Court was satisfied that there was no prejudice to the petitioner arising out of the fact that the trial court did not compel him to make a trip to Hurley for the purpose of being adjudged guilty, only to have to return later for sentence (Appendix B, p. 32).

Supposing that the court had read the report of the presentence investigation before adjudging the petitioner guilty, yet there is a presumption, where the trial was to the court without a jury and incompetent testimony was received, that the court gave no weight to the incompetent testimony, unless the contrary appears.

Birmingham v. State, (1938) 228 Wis. 448, 453, 279 N. W. 15, 116 A. L. R. 554;

3 Am. Jur. 593—App. and E. § 1037.

Compare *McCaskill Co. v. United States*, (1910) 216 U. S. 504, 516-517;

Martin v. Ibmsen, (1858) 62 U. S. 394, 395.

In this case the presumption is not rebutted, but on the contrary is supported by (1) the trial court's first memorandum opinion in which the court analyzed the evidence taken at the trial, making no reference whatever to any information possibly obtained from the presentence report (Appendix B, pp. 8-14); and (2) the fact that the trial court stated in his second memorandum opinion that he did not even request the presentence investigation until after he had dictated the first memorandum opinion (Appendix B, p. 17).

III. CONCLUSION.

It is therefore respectfully submitted that the petition for a writ of *certiorari* be denied.

Respectfully submitted,

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